Supreme Court of the United States

October Term, 1898.

No. 211.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,

Appellant,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER,

Appellee.

Brief and Argument for Appellee.

STATEMENT.

We think it important, at the very outset, to call the attention of this court to an error in the caption of this cause which appears in the record and the briefs of both parties filed in this court, as well as in the record and briefs filed in the court below. We do this because the caption as given in the record and briefs is misleading. This court would naturally infer from the caption that this is a separate and independent action against the receiver. Such is not the case. On page 22 of the printed Transcript of Record will be found a

copy of the intervening petition, in which the correct caption is given; the record thus discloses the fact to be —a fact which, from our standpoint, cannot be too strongly emphasized—that the matters in issue now before the court arise out of an intervening petition, filed in a suit brought by the trustee in a railway mortgage against the mortgageor to foreclose the mortgage; in the foreclosure proceedings the court, when appointing the receiver, directed him to pay claims of a certain character accruing within a certain time; the appellee in this cause having a claim against the railway company which fell within the class of claims thus preferred by the order of the court, appeared in the original cause and filed a brief, informal petition, setting forth its claims and praying that the same might be allowed and ordered to be paid, in pursuance of the general order of the court theretofore made directing the payment of claims of this character. Neither the trustee, the railway company, nor any party in interest, has at any time objected to the allowance or payment of the claim, and the receiver concedes that the claim is just and falls within the class of claims which, by the original order of the court above referred to, are given preference over the bonded debt; the receiver, however, objects to the allowance and payment of the claim on the sole ground that such allowance and payment "disturb the vested rights of the bondholders."

Having thus directed the attention of this court to what we conceive to be the main issue, we beg to adopt as a clear, concise and fair statement of the facts, upon which the controversy now before this court is based, the statement prepared by the United States Circuit

Court of Appeals, and embodied in the opinion rendered by it, which will be found on pages 35 and 36 of the Transcript of Record, and which is as follows:

> "In a suit brought by the Mercantile Trust Company on the 21st day of September A. D. 1893, to foreclose a mortgage upon the Chicago, Peoria and St. Louis Railway, the court appointed a receiver with the authority usually conferred upon receivers in the charge and operation of railways and in the general administration of the estate, and required the receiver to pay (1) all past due taxes, (2) all current operating expenses, (3) all past due wages, (4) 'all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past and all ticket, trackage and traffic balances due from said railroad;' to this last item the Mercantile Trust Company objected, which objection the court overruled.
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> "On the 27th day of May, 1895, the Terminal Railroad Association of St. Louis, the appellee, filed its intervening petition asserting a claim against the railway company amounting to $8,162.11 for switching, engine and car repairs, etc., done within six months prior to the date of the order appointing a receiver, and asking for the allowance of the claim as a preferential claim under the order of the court appointing the receiver. An answer was filed to this petition by the receiver, asserting that the facts stated might be true for anything known to the contrary, but, being stranger to the matters, he demanded strict proof, and denying that the petitioner was entitled to the relief demanded. The intervening petition under a general order of reference went to the master, whose report was to the effect that the claim was a just one and that the amount is a lien upon the property of the railway company prior and superior to the claims of the mortgage bondholders under the order appointing the receiver, and that it should be paid out of the surplus income or from a sale of the property of the railway company. To this report the receiver filed exceptions not impugning the finding of the master that the claim was a just one against the company, but to the finding that the claim should be paid from the surplus income or from a sale of the property of the railway company, 'whereas,' the exception proceeds, 'the said master should have found that the aforesaid amount is due the said petitioner, but is not a lien upon the property of the railway company prior or superior to the lien of the

mortgage bondholders.' Upon hearing, the court, on July 30, 1896, overruled the exceptions and entered a decree allowing the claim at the amount stated; and declaring that it was a claim of the character embraced in the order appointing the receiver, to be paid as a preferred claim and directing that the receiver pay to the intervener the amount of the claim 'out of the income of said receivership, if any such income is in his hands, and in case he has not the funds in hand for this purpose, it is ordered, adjudged and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and until paid the same is hereby declared a lien upon the said mortgaged estate superior to the lien of the mortgage herein.' To this decree the receiver assigned error in substance to the effect that the court erred in adjudging that the claim of the intervening petitioner was entitled to priority to the mortgage debt. The receiver thereupon prayed an appeal, which was allowed."

BRIEF.

POINT I.

The appellant (the receiver) has no interest, substantial or otherwise, in this controversy, and hence has no appealable interest. When the order of the court, appointing a receiver, creates, in the first instance, preference or priority as between claimants or parties in interest, interested parties alone can except to such an order or appeal from the allowance of a claim made in conformity therewith. The receiver is not such party in interest.

Thompson on Corporations, Vol. 5, Secs. 6939 and 6941;

Herrick v. Miller, 123 Ind. 305;

Staunton v. Andrews, 18 Ill. App. 552;

2 A. and E. Corp. Cases (N. S.), p. 423, note;

Re Colvin, 3 Md. Ch. 278;

Chicago Title & Trust Co. v. Caldwell, 58 Ill. App. 219;

McLeod et al. v. City of New Albany, 66 F. R. 378;

Central Trust Co. of N. Y. v. Madden, 70 F. R. 451;

2 A. and E. Corp. Cases (N. S.), p. 528, note;

Strauss v. Carolina Interstate B. & L. Assn., 24 S. E. R. 116;

A. and E. Enc. of Law, Vol. 20, p. 13;

Beverly v. Brooke, 4 Gratt. 208;

People v. Security Life etc., Assn., 79 N. Y. 267;

Dorsey v. Sibert, 93 Ala. 312;

Ames v. Railway Co., 60 F. R. 966;

Fosdick v. Schall, 99 U. S. 235;

Security Trust Co. v. Sullivan, 45 U. S. App. 601–603.

POINT II.

In appointing a receiver of the property of an insolvent railway company, upon application of the holders of its mortgage bonds, the court has the right, in the exercise of a reasonable discretion, to direct the payment of claims incurred in the operation of the property in preference to the mortgage debt; the payment of such claims may be made a condition of the appointment of a receiver.

Turner v. Indianapolis, etc. R. R., 8 Bissell, 315;
Fosdick v. Schall, 99 U. S. 235;
Union Trust Co. v. Souther, 107 U. S. 591;
Burnham v. Bowen, 111 U. S. 776;
Farmers' Loan & Trust Co. v. Green Bay Ry. Co., 45 F. R. 664;
American Loan & Trust Co. v. Railroad Co., 46 F. R. 101;
Kneeland v. American Loan & Trust Co., 136 U. S. 89;
Central Trust Co. v. St. Louis, etc. R. R. Co., 41 F. R. 551;
Blair v. St. Louis, etc. Ry. Co., 22 F. R. 471;
Ames v. Union Pacific R. R. Co., 74 F. R. 335;
Wood v. Guarantee Trust & Safe Deposit Co., 128 U. S. 416;
Miltenberger v. Railroad Co., 106 U. S. 286;
Farmers' Loan & Trust Co. v. Railroad Co., 53 F. R. 182;
Poland v. Railroad Co., 52 Vt. 144.
Morgan's L. & T. R. & S. Co. v. Railroad, 137 U. S. 171;
Hale v. Frost, 99 U. S. 389;
Drennen v. Mercantile Trust & Deposit Co., 8 A. and E. Corp. Cases, Vol. 8 (N. S.), 60.

POINT III.

When the record is silent as to the facts on which the court entered the order preferring claims of a certain class, the Appellate Court will not say such order was improvidently entered.

Smith v. Fletcher, 11 S. W. R. 824;
Detro v. State, 4 Ind. 200;
Elliott's Appellate Procedure, Secs. 710 and 709

POINT IV.

An objection to the allowance of a claim in a receivership proceeding, not made before the Master in Chancery to whom the claim was referred, or in the trial court, upon exceptions to the report of the master allowing the claim, cannot be made in the Appellate Court.

BRIEF AND ARGUMENT.

POINT I.

The appellant (the receiver) has no interest, substantial or otherwise, in this controversy, and hence has no appealable interest. When the order of the court appointing a receiver creates, in the first instance, preference or priority as between claimants or parties in interest, interested parties alone can except to such an order or appeal from the allowance of a claim made in conformity therewith. The receiver is not such party in interest.

The opinion of the Court of Appeals is as follows:

> "The contention of the receiver is thus stated in the brief of his counsel: 'The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same. The only controversy is as to whether or not the appellee is entitled on its petition and proof made thereunder to have the vested lien of the mortgage, displaced to the extent of his claim.' He insists that the provision in the decree appointing a receiver providing for the payment of certain claims as preferential created no vested right, and that within our ruling in *Mather Humane Stock Transportation Company vs. Anderson*, 46 U. S. App. 138, the decree in that regard was interlocutory and is not controlling of the subsequent action of the court; and that within the doctrine declared in *Turner vs. The Indianapolis, Bloomington and Western Railway Company*, 8 Bissell, 315; *Fosdick vs. Schall*, 99 U. S. 235; *Union Trust Company vs. Souther*, 107 U. S. 591; *Burnham vs. Bowen*, 111 U. S. 776; *Union Trust Company vs. Illinois Midland Railway Company*, 117 U. S. 432; *Wood vs. Guarantee Trust and Safe Deposit Company*, 128 U. S. 416; *Kneeland vs. American Loan and Trust Company*, 128 U. S. 89; *Thomas vs. Western Car Company*, 149 U. S. 111; *Farmers' Loan and Trust Company vs. Green*

Bay, W. & St. P. Railway Company, 45 F. R. 664, before a claim can be deemed to be preferential to the mortgage debt, there must be first established a diversion of income from the payment of operating expenses to the payment of interest and that, failing diversion, there can be no restoration. The broad ground is taken that a court of equity, assuming at the request of a trustee the operation of a railway, has not the right to provide for the payment, out of the income or the corpus of the road, of operating expenses incurred within a limited time prior to the suit, unless there has been diversion of income and then only to the extent of such diversion.

"It is, however, objected by the appellee that with this question the receiver is not concerned and that, the justice of the debt being conceded, it is none of his affair that it is preferred by the decree to the mortgage debt. This contention, we think, must be sustained. While it is true that a receiver is the instrument of the court for the conservation of the estate which the court has taken into its possession for administration, it is also true that in a sense he represents all parties in interest. His duty is to defend the estate against all claims which he deems to be unjust; his duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled; he represents the estate, with right to sue to recover demands due to it; with right to defend it against claims asserted. In this respect we concur with the Circuit Court of Appeals for the Fourth Circuit that this duty carries with it the right and the duty, in case of doubtful claim, to take the judgment of the court of last resort. *Thom vs. Pittard*, 8 U. S. App. 597. This right and duty should, however, be limited in its exercise to those cases in which the estate, as a whole, is interested to enforce a right or to defend against a claim asserted. In respect to many matters, the receiver has no right to appeal, while in respect to others, his right of appeal may not be gainsaid. Thus, he may rightfully appeal from a decree refusing him compensation, or disallowing his accounts, or establishing a claim against the estate, or denying a claim asserted for the estate. He has no right to appeal from a decree removing him from his position, for that is matter of discretion with the court appointing him, and he holds his position by the sufferance of the court; nor has he the right of appeal from a decree authorizing an issue of receivers' certificates, or directing a particular management of the trust property, or directing sale of the mortgaged property or confirming its sale, or di-

recting the turning over of property in his hands; for he is neither the censor of the court nor interested in the event. Illustrations might be multiplied. The true line of demarcation, we think to be this: He has the right of appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate; he has the right of appeal from any decree which affects his personal right, for therein he has an interest; but he has not the right of appeal from a decree declaring the respective equities of parties to the suit. He should therein be indifferent and not a partisan. His duty is to all parties in common. He should not become the advocate of one against another. *Security Trust Company vs. Sullivan*, 45 U. S. App. 601, 603.

"The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that prior to the decree appealed from the railway had been sold under decree of sale and had passed out of the possession of the receiver and into the possession of the purchaser, and that the receiver had not in hand moneys with which to pay the debt adjudged. That this debt was a just claim against the estate is not doubted and is conceded. No objection is taken to its allowance, nor is it questioned that under the decree appointing the receiver it was a proper claim to be paid in preference to the mortgage; but the receiver asserts that the decree allowing preferential claims was improvident, and that the mortgage had preference in payment, because there had been in fact no diversion of income to the payment of interest. Neither the trustee, nor the bondholders, nor the purchaser is here objecting. Who made the receiver the guardian of their interests in this regard? What duty is imposed upon him to assert the supposed right of one creditor over another in respect to a common fund; and this, whether the estate remains in his custody or has passed from his possession and control under decree and sale? By what right does he become the partisan advocate when his duty demands of him impartiality and indifference with respect to the division of this common fund? By what authority may he assert the rights of a purchaser? By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it? He has no such right. He is in so doing an interloper, obtruding himself in breach of his duty where he

has no right and in a matter with which he is not concerned. To sanction such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the interested parties, and to hold out the temptation to a receiver and his counsel to swell the cost of administration by assuming litigation with which he has no right to interfere.

"It was held in *Farlow vs. Kelley*, 131 U. S. Appendix, cci., that the allowance by a Circuit Court of an appeal taken by a receiver is equivalent to leave by the court to the receiver to take an appeal, and it is urged that since the appeal here was allowed by the Circuit Court according to usual practice, we are bound to entertain it and to determine the question which the receiver has presented. In some States it is held that no case may be appealed by a receiver without permission, notwithstanding parties may appeal as of right and without leave. The Supreme Court, in the case referred to, merely holds that if leave were essential it was granted by the usual allowance of an appeal; but it is nowhere held, and the doctrine cannot be sanctioned, that the allowance of an appeal can operate to clothe the receiver with an interest which he has not, or can impose upon an Appellate Conrt the duty of hearing and determining a moot question.

"The appeal will be dismissed."

The receiver has no interest, substantial or otherwise, in this controversy. To the order of the court creating a preference in favor of claims for supplies and labor, incurred within the six months preceding the appointment of the receiver, over the lien of the mortgage debt, the receiver did not and could not, at the time the order was entered, object, nor can he now object; he did not and could not question the propriety of that order; he did not and could not question the exercise of the discretion of the judge in making the order; and he cannot now attack as improvident the decree of the court entered in conformity with that order.

In his report on appellee's (intervener's) intervening petition, the Master in Chancery found that the

amount of the intervener's claim was a lien superior, under the order appointing the receiver, to the mortgage debt; in confirming this report and overruling the exceptions, the court found that the labor and material forming the basis of intervener's claim were performed and furnished within the six months preceding the appointment of the receiver, and were embraced in the order directing the receiver to pay such claims as preferred claims; and the receiver himself admits that the claim is just and comes clearly within the provisions of the order appointing the receiver and directing him to pay, as preferred, certain claims. It therefore follows, we claim, as a necessary, legal and logical sequence, that the decree directing the payment of this claim must stand, unless the order of the court in the first instance was improvidently made; and it also follows that the receiver cannot attack the decree from which he takes his appeal without assailing, also, the order made at the time he was appointed receiver. It is equally true, we insist, that, although it might be conceded, for the sake of the argument, that the order was improvidently made in the first instance, this objection can be urged only by parties in interest—and the receiver is not such a party—and, to avail the parties in interest, should have been insisted upon at the time the order was entered; and, when overruled, exception should have been entered or appeal taken.

We again call the attention of this court to the caption of this cause, as found on the title-page of the Transcript of Record, as well as on the title-page of the Brief and Argument of Appellant—an error which we have been forced to follow (but not adopt) to avoid

confusion. The caption would suggest that this is an appeal from a judgment rendered in an independent action by appellee against C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis Railway; whereas—and the record so discloses—it is an appeal of the receiver from a decree of the court entered on an intervening petition in the cause of the Mercantile Trust Company against the Chicago, Peoria and St. Louis Railway Company *et al.* How the error arose it is immaterial now to inquire, and we call attention to the fact for the one reason that, from our standpoint, it emphasizes the graver error in which we contend the receiver has fallen, namely: insisting that this is a controversy between himself and the intervener.

The relation of appellant to the controversy and his interest therein are fully disclosed in his brief and argument in support of his petition for writ of certiorari filed in this court. His statement of the case, covering pages 1 to 7 of that brief and argument, is a fair presentation of so much of the record as is necessary to determine his relation to the controversy, and, taken in connection with his argument, furnishes the grounds upon which appellee contends that he has no appealable interest.

From his own statement it appears that the order appointing him receiver directed him to pay

> "all claims for material and supplies which have been incurred in the operation and maintenance of said property during the six months last past, and all ticket, trackage and traffic balances due from said railroad."

Some time subsequent to the appointment of the receiver, appellee filed its intervening petition, alleging

that within the six months prior to the appointment of the receiver it performed certain labor and furnished certain material for and to the defendant railway company, and asked that its claim be allowed and directed to be paid under this order. This petition, under a general order of reference, went to the Master in Chancery, who, having heard evidence, reported that there was due the intervener the amount of its claim as set forth in the intervening petition, and found that the same was a lien on the property of the railway company prior and superior, under the order appointing the receiver, to the claim of the mortgage bondholders, and recommended that the same should be paid out of the surplus income or from a sale of the property. To this report the receiver alone filed exceptions, and his exceptions having been overruled, he alone appealed to the United States Circuit Court of Appeals, and from the finding of that court he alone appeals to this court.

On page 6 of the receiver's brief, filed in the Court of Appeals, in this cause, he says:

> "The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporatien, nor as to the value of the same. The only controversy is as to whether or not the appellee is entitled, on its petition and proof made thereunder, to have the vested lien of the mortgage displaced to the extent of its claim."

This language from the receiver's brief in the court below is cited in the opinion by that court, and will be found in the first paragraph of that opinion. (Transcript of Record, p. 47.) This frank statement by the

receiver of the issue, clearly presents the question of his appealable interest in this controversy. The complainant in the bill, the trustee for the bondholders, in the foreclosure proceeding, did not except to the report of the Master in Chancery allowing appellee's claim, nor did it except to the order of the court confirming that report and directing the payment of the claim out of funds in the hands of the receiver, or out of the proceeds of a sale of the mortgaged premises. No creditor has objected to the decree in appellee's favor, nor does the defendant company object. For aught that the record shows to the contrary, all parties who have or may have any possible interest in the controversy are willing that the claim should take precedence over the mortgage debt and be paid. The receiver alone objects. He admits that the claim is, in all respects, just, and that it falls within the order of the court directing him to pay claims accruing within six months prior to his appointment; the sole ground of his objection is that it "displaces the vested lien of the mortgagees."

The receiver wholly misconceives his position and his duty. The decree of the trial court from which he takes his appeal was entered without protest or objection upon the part of any one in interest, and is a simple order directing him, as an officer of the court, in control of funds coming into his possession under the order of that court, to pay out of such funds a claim which the court has passed upon and found to be correct. The receiver admits that the claim is justly due, but refuses to comply with the order of the court because, in his opinion, the payment of the claim will

"displace the vested contract lien of the mortgage bondholders." As an officer of the court, in physical possession of funds entrusted to him by that court, what interest has he in a controversy between rival claimants to a portion of that fund? As such officer of the court, does it become any part of his duty to protect complainant in the foreclosure proceeding against the operation and decree of the court, especially when the complainant is not seeking such protection? The decree does not, in any manner or to any extent, impair the fund of which the receiver is the custodian. The decree is, in fact and in effect, nothing more or less than an order of distribution; and, as between distributees, creates a preference in favor of one as against the other. What interest has the receiver in this preference? This preference was created, in the first instance, in the order appointing the receiver. Could the receiver, taking possession under that order, made by it an officer of the court, clothed by virtue thereof with whatever power he may possess, have objected to any provision of that order? Could he, upon qualifying as receiver, file his exception as such receiver to the order of the court making certain claims preferred? If he had, at the time of his appointment, no right to object to such provision of the order, what right has he now to object, when instructed to act in pursuance thereof? When the court appointed him, it said to him, in effect:

> "There are certain claims which the court decrees shall have priority over the mortgage debt; these claims you are to pay first."

The receiver accepts the appointment, takes possession of the property, and, when directed by the court to

pay a preferred claim which he concedes to be just, says:

> "Your order was improvident; I am of the opinion that you cannot displace the vested contract lien of the bondholder; the bondholder does not object, but I object for him."

We do not lose sight of the fact that at the time the order was entered, the record shows that counsel for the complainant objected to that portion of the order directing the receiver to pay claims of the class of which this is one; but the complainant who made the objection can alone secure the benefit of it, and that benefit it is not now, in its own name or in its own behalf, seeking to enforce. The record shows no motion for review or modification of, or appeal from the order; and, moreover, the provision that claims of a certain character should be preferred to the mortgage debt became one of the conditions upon which the receiver was appointed.

It may be true that counsel for the receiver in this cause was counsel for the complainant in the foreclosure proceeding. In the petition for rehearing filed in the court below, and printed in Transcript of Record, p. 39, *l. c.* 56, the attention of that court was called to the fact that the solicitors for the receiver also represented the complainant, the trustee, in the foreclosure proceeding. We do not now say that there is any inconsistency in the dual position thus held by the counsel for the receiver; although he admits

> "that the better practice forbids this, and requires that the trustees, at whose suit he is appointed, should have separate counsel. In some circuits, especially in cases of great importance, the courts either appoint separate counsel for the receiver, or require the latter so to do."

This "better practice" was adopted in answer, we may suggest, to the prayer of conscientious counsel for the trustee that he "be not led into temptation." But we do insist that the counsel for the receiver cannot, because they represented and now represent the complainant in the foreclosure proceeding, make a cat's-paw of their client, the receiver, for the benefit of another client, the complainant in the foreclosure proceeding. In fact, the petition for rehearing in the court below practically concedes that it is not the receiver who is interested in this controversy, but the complainant in the original cause, who is not a party to the appeal, and who did not except to the finding of the master or the decree of the trial court thereon. On page 38 of his brief in support of his petition for rehearing in the court below (Transcript of Record, p. 57), the receiver makes the remarkable request that this cause be remanded to the trial court,

> "with directions to permit either the complainant in the original cause, or any party who has succeeded to its rights, to be made a party to the intervening petition, and with the right of appeal from a decree of the Court thereon."

This prayer, we contend, is an admission that the receiver has no appealable interest. The receiver forgets that this controversy arose out of an intervening petition filed in the original cause, and hence the complainant in that original proceeding was a party so far as the intervening petition is concerned. This request of the receiver, addressed to the court below, is an open and bold declaration to the effect that in the prosecution of the appeal he represents the complainant in the original cause or its successor in interest—

that he has yielded to the temptation from which the "better practice" would have saved him.

What right has the receiver to take this attitude?

Mr. Thompson, in his recent work on corporations, Vol. 5, Sec. 6939, says:

> "If the receiver is appointed by a Court of Equity, he represents in a sense the Court, whose hand he is sometimes said to be."

Again:

> "The receiver being the mere officer of the Court, the control of the Court over him is *plenary*, at least in any controversy which may arise between him and the Court touching the propriety of any order of the Court made upon him. . . . He has no discretion, in general, *in the application of funds in his hands*, but holds them strictly subject to the order of the Court, and to be disposed of as the Court may direct. He cannot appeal from an allowance made by the Court in favor of the claimants against funds in his hands."—*Ibid, Sec. 6941.* (Italics are ours.)

The case of *Herrick v. Miller, 123 Ind. 305*, arose out of an action to foreclose a mortgage. During the pendency of the action a receiver was appointed, and, as such, became possessed of certain funds, which the Court directed him to pay over to the mortgagee. The receiver appealed from the order, and the mortgagee moved in the Supreme Court to dismiss the appeal. In passing upon this motion the Court says:

> "It is well established that courts have power over their own receivers to control them in the settlement of all demands against the property in their hands, and as officers of the Court it is their duty to obey the orders of the Court. . . . A receiver cannot contest an allowance made to one of the parties to a suit in which he was appointed by the Court from which he received his appointment. . . . When the Court acquires jurisdiction over the parties to the suit, all orders made as to the disposition of the funds

> in the hands of the receiver binds them until reversed, and is a complete protection to the receiver. To permit the receiver to question the correctness of such orders would be to permit the constant 'rebellion of the hands against the head,' which would result in the utmost confusion and would wholly destroy the usefulness of the office of receiver."

The appeal was dismissed.

The case of *Staunton v. Andrews, 18 Ill. App. 552*, reached the Appellate Court upon an appeal of the receiver from an order directing him to pay a claim which had been allowed against the funds in his hands. The receiver had been appointed in a creditors' suit. The Court says:

> "No one of the creditors or claimants is here to complain. The only person taking the appeal or assigning error is the receiver. . . . A receiver is an officer of the Court, and has been figuratively styled the hands of the Court. With that figure in mind, this case appears very much like a mild rebellion of the hands against the head."

This cause does not present the question whether or not the complainant in the foreclosure proceeding, or any creditor of the defendant railway company, or any one claiming an interest in the funds in the hands of the receiver, could have asked for a review or modification of the decree making appellee's claim preferred, had the proper steps been taken at the proper time. Our claim is simply that the receiver cannot ask for such review or modification; that the Court will not permit the receiver to be made a cat's-paw for the complainant in the foreclosure proceeding; that the receiver has no interest in the controversy; that, as between rival claimants, he must remain silent and inactive; that he has no right to take sides with either party. It was his duty to know that the claim was

just and fair, and that it came within the purview of the order of the Court making claims of a certain class preferred to the mortgage debt. In putting appellee to the proof of these facts he but did his duty; here his duty ended, so far as any resistance to the allowance or payment of the claim is concerned. He wholly forgets that duty and goes beyond it when he attacks the propriety of the order of the Court determining the general principle of preference as between claims of creditors. The Court, in the exercise of its discretion, saw fit, in taking possession of the property of the railway company and appointing a receiver at the instance of the bondholders to make, as a condition of such appointment, that claims for labor and supplies incurred within six months prior to the appointment of the receiver should have preference over the mortgage debt. The only parties interested in this order are the parties who would eventually become entitled to the surplus income and proceeds of a sale of the property. None of these parties are here objecting. So far as the record shows, they are wholly satisfied with the order. The record shows no effort upon the part of the complainant in the foreclosure suit to insist upon the objection made by it when the order was entered.

We do not controvert the doctrine that the receiver has the right to appeal from a judgment rendered against him arising out of a matter connected with his operation of the trust estate. This is not a judgment against the receiver rendered in an action brought against him. No act of his is called in question. The decree appealed from in this cause is on an intervening petition, and simply declares that a claim, which the

receiver admits to be just and to fall clearly within the provisions of the order directing certain claims to be paid, shall be paid in accordance with the provisions of that order, and shall have preference over the lien of the mortgage debt. The objection that the receiver makes to the payment of the claim goes, not to the justness of the claim, but to the propriety of the order made by the Court in the first instance, giving the claim preference over the mortgage debt.

> "A receiver cannot intermeddle in questions affecting the rights of parties in the disposition of property in his hands." *2 A. and E. Corp. Cases (N. S.), p. 423, note.*

The receiver, as such, has absolutely no interest whatever in this controversy; his one duty is to obey the instructions of the trial court; the decree of that court fully protected him, and to it no interested party objected, and from it no interested party appealed.

> "As well might it be said that the register of this Court, when ordered to draw a check for money paid into Court to the credit of the cause, could stay the execution of the order by appealing and giving bond."
>
> *Re Colvin, 3 Md. Ch. 278.*

The case of *Chicago Title & Trust Company v. Caldwell, 58 Ill. App. 219*, contains a vigorous declaration of the principle for which we contend. In that case the Court ordered that a certain claim

> "be allowed against the estate (in the hands of the receiver) to be paid *pro rata* with the claims of general creditors."

From this order the receiver appealed. Mr. Justice Gary, in delivering the opinion of the Court, says:

> "Very vague and confused notions seem to prevail in this county—we have not observed that they have spread over

the State—as to the powers of receivers. A receiver is the mere hand of the Court to do what the Court directs. When in passing upon his accounts, the Court charges or refuses to allow items, and he claims that the action of the Court does him wrong personally, he may appeal," citing *Hinckley v. Gillman, etc. R. R., 94 U. S. 467; How v. Jones, 60 Iowa, 70.*

The Court continues:

"But if he may appeal from one order in which he has no interest, as to the distribution of assets, he may from every one; and unless he can be charged with bad faith or want of reasonable prudence, his expenses and reasonable compensation must come out of the assets. No precedent for such an appeal has come to our knowledge, except a series of cases in *28 N. Y. Sup.*, where, under the peculiar system of New York, it was held that a receiver having a right to apply to the Court for instructions was entitled to instruction by the entire Court, and, therefore, might appeal from special to general term. *People v. St. Nicholas Bank, 28 N. Y. Sup. 407.* But even the vigorous protest of Van Brunt, P. J., would seem unanswerable if the appeal were to another court. This point has not been made by counsel for appellee, *but we cannot sanction, even by silence, the idea that a receiver may set up in opposition to the Court his theories of how the assets shall be disposed of. Next we will have clerks appealing from the direction of the Courts to enter orders unwise in the opinion of the clerks. The appeal is dismissed at the cost of the appellant, to be paid by it without any charge against the estate for costs or other expenses.*" (Italics are ours.)

The appeal in this cause is not only an appeal from an order of distribution, but is an attempt to attack as improvident that portion of the decree of the Court under which the receiver was appointed, preferring and directing him to pay all claims of a certain class within which appellee's claim falls. The Court, hearing the application of the complainant in the foreclosure proceeding for the appointment of a receiver, granted its application, but in so doing saw fit to direct that certain claims should take precedence over the lien of the

mortgage debt. There is nothing in the decree requiring proof of diversion before such a preference can become fixed or established. So far as the receiver is concerned, the order creating the preference is absolute, and his only duty thereunder was to see that appellee's claim was correct and fell within the provisions thereof, and this he admits. By his appeal he seeks to have modified the order under which he was appointed, and in respect to a feature of the order with which he has absolutely no concern. All of the parties having any interest in this order were in court when the intervening petition was filed, when the master's report was made, when exceptions to that report were filed, and when such exceptions were overruled and the decree of the trial court entered thereon. They were not only in court, but were parties to the intervening petition.

In the case of *McLeod et al. v. City of New Albany, 66 F. R. 378*, it is said:

> "The parties to an original bill are, in fact, parties to an intervening petition filed in the suit, and bound to take notice of such petition and the proceeding thereunder, though not made formal parties to the petition."

We fail to find a single case in which the question of preference or priority of one class of creditors over others has been raised, that has been taken to an Appellate Court on the appeal of the receiver, and in which the receiver's appeal has not been dismissed.

In the case of *Central Trust Company v. Madden, 70 F. R. 451*, one of the complainants in a consolidated cause appealed from the decree of the Court making a judgment against the defendant company a lien prior to complainant's mortgage. The Court says:

> "It is objected by appellant that the Central Trust Company should have been a party to the intervention; but that

company was complainant in one of the suits, and bound to take notice of the intervention and proceedings thereunder."

Again:

"When property is in the custody of the Court for distribution, under a receivership, *it is the duty of the persons claiming to be interested in it or its earninys, or in the proceeds of its sale, to come into that Court and set up their rights.*" *2 A. and E. Corp. Cases (N. S.), p. 528.* (Italics are ours.)

In his brief in the Court of Appeals, appellant insisted that in the absence of any proof of diversion—that is, application by the railway company of its current income to the payment of interest on the mortgage debt—the claim of a creditor who furnished material or performed labor within six months prior to the appointment of the receiver could not take precedence over the lien of the mortgage debt. To this we answer: First, that the receiver cannot raise this question at any time, in any manner, at any stage of the proceedings; Second, that the question of priority of the claim of the material man or laborer over the lien of the mortgage debt is one that concerns the claimant and the bondholder alone, and one in which the receiver has no right to intermeddle; Third, this question was settled by the decree of the Court which created the preference in favor of the claimant in the first instance, and this decree is binding on all parties until modified at the instance of the bondholder, and the bondholder, having failed to appeal from the decree, cannot now question the propriety of the order: Fourth, under any circumstances, it would be incumbent upon a party in interest, attacking the order of the Court creating the preference in favor of the ma-

terial man or laborer over the bondholder upon the ground that there was no proof of diversion, to plead this defense; and Fifth, if the receiver defends on the ground that the order of the Court was improvident because there was no diversion, it was certainly his duty to so plead in resisting the claim, and offer evidence in support of the plea; it could not have been incumbent on the claimant to show that the order was not improvident.

We have been unable to find a single authority which sustains the right of a receiver to appeal from an order of the Court determining questions of priority or preference as between creditors of an insolvent company.

In the case of *Strauss v. Carolina Interstate B. and L. Ass'n, 24 S. E. R. 116*, a receiver had joined with certain stockholders in an appeal from a decree of the Court prescribing the method in which the receiver should adjust the claims of the different classes of stockholders (creditors). In passing on the appeal the Court says:

> "We call attention to the fact that the receivers are appellants now and at the last term, when it does not appear that any question is presented in which the corporation is interested; there are cases in which it is the duty of the receivers to appeal where they think the party or corporation they represent has not had justice, but it is not considered to be their duty to appeal in the interest of one portion of the stockholders against the other. And as to their duties, it is expected they will observe the direction of the Court from whom they received their appointment. If any of the parties interested as corporators think the judge's instructions are erroneous and injurious to them, they may appeal."

The receiver insists that he represents all of the parties to the foreclosure proceeding. This is true, undoubtedly, so far as preservation and management of the trust estate placed in his hands by order of the Court is concerned; but it is not true that, as between parties whose interests may conflict, he may represent the interests of one as against the other. While his counsel may be also the counsel for the complainant in the bill of foreclosure, it is not his duty to fight his counsel's battles when representing the trustees or bondholders. Conceding for a moment the correctness of the receiver's contention—that he represents all the parties in interest—then it must follow that he represented the intervener as well as the complainant in the bill of foreclosure, and the defendant; and, therefore, if the finding of the Master or of the trial Court had been adverse to the intervener, it would have been the duty of the receiver to appeal. But the receiver does not represent in any sense any one of the parties to the suit, except in so far as it is his duty to manage the property to the best of his ability and in pursuance of the orders of the Court.

> "As an officer of the Court, the receiver is subject to its direction and control; and he is not the representative of either or any of the parties to the litigation, but acts for the benefit of all concerned in the controversy." *A. and E. Enc. of Law, Vol. 20, p. 13.*

In *Beverly v. Brooke, 4 Gratt. 208*, it is said:

> "It is of no consequence to him [the receiver] how, or when, or to whom the Court may dispose of the funds in his hands, provided the order or decree of the Court furnishes to him a sufficient protection."

In *People v. Security Life, etc. Assn., 79 N. Y. 267*, the Court says:

> "He [the receiver] is not to advocate the cause of one claimant as against another; between them he is indifferent, owing a like duty to all, and for that very reason should, as far as possible, see to it that each has an equal opportunity to enforce his claim."

In *Dorsey v. Sibert, 93 Ala. 312*, it was held:

> "An appeal by a receiver from an order allowing claims on the funds in his hands will be dismissed."

In *Ames v. Railway Co., 60 F. R. 966* (*l. c. 969*), it is well said:

> "It is well settled that the receivers of an insolvent railroad corporation, appointed by a Court of Chancery, to preserve its property and operate its railroad, do not stand in the shoes of the corporation. They are neither the representatives of the insolvent corporation nor of its creditors or stockholders; they are the officers and representatives of the Court—the hands of the Court."

In *Fosdick v. Schall, 99 U. S. 235* (*l. c. 251*), Chief Justice Waite thus concisely defined the relation of the receiver to the parties in interest:

> "He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the Court proceeds to determine the rights of the parties upon the same principle it would if no change of possession had taken place."

In this case the trial Court "*determined the rights of the parties*," that is, the right of the intervener seeking to have its claim for material furnished to and labor performed for the insolvent railway company paid out of proceeds of sale of the mortgaged premises before the holders of bonds secured by a mortgage upon the property should have their claim paid. As between

these claimants the trial Court found in favor of the intervener, and then directed the receiver, its officer, to pay the intervener's claim. In response to this direction, the receiver not only refuses to obey the order, but assails the discretion of the Court and attacks its order as improvident—this, too, in spite of the fact that neither the bondholder nor the railway company makes any objection. The words above quoted from *Fosdick v. Schall* are quoted by the receiver in his petition for rehearing (p. 41, Transcript of Record). It is, however, apparent, that in construing this citation the receiver has substituted the word "receiver" for the word "court;" for he seeks to make it *his* duty to determine the rights of the parties, and having done this, to direct the Court to make the distribution in accordance with his findings. Is it, therefore, surprising that the Court of Appeals, in dismissing the receiver's appeal, should administer a rebuke in the following vigorous language:

> "That this debt was a just claim against the estate is not doubted and is conceded. No objection is taken to its allowance, nor is it questioned that under the decree appointing the receiver it was a proper claim to be paid in preference to the mortgage; but the receiver asserts that the decree allowing preferential claims was improvident and that the mortgage had preference in payment because there had been in fact no diversion of income to the payment of interest. Neither the trustee, nor the bondholders, nor the purchaser is here objecting. Who made the receiver the guardian of their interests in this regard? What duty is imposed upon him to assert the supposed right of one creditor over another in respect to the common fund; and this, whether the estate remains in his custody or has passed from his possession or control under decree and sale? By what right does he become the partisan advocate, when his duty demands of him impartiality and indifference with respect to the division of this common fund? By what authority may he assert the right of the purchaser? By what

> right does he undertake to prevent the enforcement of this claim against the purchased estate presumably by the decree of sale charged as a lien upon it? He has no such right; he is, in so doing, an interloper obtruding himself, in breach of his duty, where he has no right, and in a matter with which he is not concerned. To sanction such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the interested parties, and to hold out the temptation to the receiver and his counsel to swell the costs of administration by assuming litigation with which he has no right to interfere." (Pages 37 and 38, Transcript of Record.)

In his petition for rehearing filed in the Court of Appeals (Transcript of Record, p. 40), the receiver, commenting upon that part of the opinion of that Court referring to the admission made by the receiver that the intervener's claim was just, says:

> "The Court has correctly stated the contention of the receiver, but we submit it has drawn from the language used by his counsel an erroneous conclusion, viz.: 'That this debt was a just claim against the estate is not doubted.' The distinction between the concession made by the receiver and the conclusion drawn by the Court is vital, in the determination of the receiver's right to appeal. The receiver admits the claim to be just as against the *railway company*, but *expressly denies* it to be just as *against the estate* in his hands for conservation."

We confess our inability to comprehend the distinction the receiver seeks to make. Conceding the mortgage debt to be a valid claim against the railway company; conceding, as the receiver does, intervener's claim to be also a valid claim against the railway company, the only question that can possibly arise is, which claim shall take preference in order of payment out of the property of the railway company or the proceeds of a sale of such property in the hands of the receiver. This being, then, the question, and the only

question in the case, and one the determination of which affects only the bondholders and the intervener, and possibly other creditors, how is it possible that the determination of this question can affect or touch in any manner the duties of the receiver as the conservator of the estate? When the court took possession of the property of the insolvent railway company, it was for the purpose of doing that which the railway company could not or would not do, namely, paying the creditors of the railway company, unsecured as well as secured, in the order in which equity might determine the priorities, and so far as the assets of the insolvent company might be sufficient to meet its liabilities. The receiver seems unable to comprehend the fact that the question of *preference or priority as between creditors is one which concerns the creditors only.* In his petition for rehearing filed in the Court of Appeals the receiver said (Transcript of Record, p. 40):

> "We would find no difficulty in agreeing with the conclusion of the Court that the receiver had no interest in the appeal, if we conceded that debt to be a just claim against the estate, for then clearly it would be a matter of indifference to him how it was satisfied. But the concession of the receiver is, that as against the railway company only, and not against the estate, is the claim just."

The manifest answer to this is that the debt of the insolvent railway company to appellee, for material furnished and labor performed, within the period fixed by the Court giving priority to such claims, when properly presented and allowed and proven, or conceded to be just, became a claim against *the estate of the insolvent railway company in the receiver's hands.* The receiver could not pay any debt of the insolvent company which was not a claim against the estate of that com-

pany in his hands as such receiver. The very object of the Court in giving to claims of this character a preference over the mortgage debt was that such claims might be satisfied out of the funds of the insolvent company in the hands of the receiver. The intervener went into court, not for the purpose of securing a valueless judgment against an insolvent railway company, but for the one purpose of having its claim against that company adjudicated and declared to be a lien against the property of that company in the hands of the receiver; and when its claim was presented it was the duty of the receiver to know that the amount of the claim was correct, and that the labor and materials for which the claim was made were of the character made preferred by the order of the Court, and were performed and furnished within the six months. And here his duty ended. The payment of intervener's claim is no more a diminution of the estate than would be the payment of the mortgage debt; the payment of intervener's claim, as well as the payment of the mortgage debt, out of the funds of the insolvent company in the receiver's hands, is simply a distribution of the assets of the estate. From the receiver's standpoint, every payment he makes out of the assets of the estate—the payment of his own salary, the payment of the fees of his counsel, the payment for supplies used by him in the operation of the property—is a diminution of the assets of the estate and should be strenuously opposed, and he will be doing only his duty in "carrying that resistance to the court of last resort." But the one and only defense the receiver makes is that the payment of the claim "displaces the vested lien of the mortgage." This,

and this alone, constitutes his "good and valid defense;" and yet he winces under the judicial finding of the Court of Appeals, that he has "become the partisan advocate, when his duty demands of him impartiality and indifference with respect to the division of the common fund." It is difficult to conceive in what way he could make himself more distinctly, confessedly and avowedly the unsolicited champion of the interests of the uncomplaining mortgagee or purchaser under the foreclosure proceeding, or in what way he could show a greater disregard of his duty to remain impartial as between creditors contesting the right of priority. We submit the stricture of the Court of Appeals needs no apology or modification.

Great stress is placed by the receiver on the case of *McLeod v. City of New Albany, 66 F. R. 378,* cited in the petition for rehearing in the Court of Appeals, as well as in the brief in support of the petition for writ of *certiorari* addressed to this Court. The decision in that case, we contend, is in entire harmony with the decision rendered by the Court of Appeals in this case, and is within the unbroken line of decisions of State, as well as Federal courts, defining the receiver's duties. In the quotation given by the receiver from the *McLeod* case occurs this passage:

> "It was their [receivers'] duty to preserve the estate and to pay the taxes thereon. *If the taxes were illegally laid,* it was their duty, representing all in interest, to contest payment." (The italics are ours.)

In this case it was clearly the duty of the receiver to see that the intervener's claim was just. In the *McLeod* case the Court held that it was the duty of the receiver to see that the taxes were legally laid, and that this

duty devolved upon him as representing all the interests; so we readily concede that, for the purpose of ascertaining the correctness of intervener's claim, the receiver represented all the interests. In the *McLeod* case the Court held that it was the duty of the receiver to contest payment of the taxes if illegally laid. In this case, intervener's claim, taxes, and operating expenses stood on the same footing, and it was as much the duty of the receiver to pay intervener's claim, if just, as it was his duty to pay taxes legally laid and operating expenses. The justness of intervener's claim being conceded, the receiver's duty ended so far as resistance of payment of the claim was concerned. We earnestly and respectfully suggest that the *McLeod* case does not, as claimed by the receiver,

> "present fairly and squarely the question as to whether or not the receiver had sufficient interest in the controversy between various creditors, claiming priority over each other, out of the estate for which he was appointed to conserve, to present the matter for final determination to the court of last resort."

This question, we insist, did not arise in the *McLeod* case. The only question presented in the *McLeod* case was as to whether, in resisting the payment of taxes upon property in the receiver's possession claimed by the receiver to be illegally laid, and hence not a just or valid claim against the estate, the receiver represented all the parties to the original bill. The Court held that for this purpose the receiver did represent all of the parties to the original bill; and so in this case, for the purpose of determining whether intervener's claim was just and valid, the receiver represented the complainant and the defendant railway company in the original bill,

as well as all other parties to the original bill, but he did not and could not represent the complainant in that bill as against the intervener when the question arose as to whether intervener's claim should take preference over the claim of the parties represented by the complainant in the bill of foreclosure.

In every case cited by the receiver in support of his right to take an appeal, such right has been conceded only where the determination of the question involved might work a diminution or increase of the estate as a whole; the same is true of the citations from the text writers. For instance, in the citation from *High on Receivers, Sec. 264*, occurs this language:

> "And although leave may be granted to sue a receiver, he is at liberty to assert any defense which he may have to the action, either by plea, answer or demurrer, and he has the same right of appeal from an adverse judgment for the recovery of funds pertaining to his receivership as the party over whom he was appointed would have had."

And in his citation from *Beach on Receivers, Sec. 716*, occurs this language:

> "The receiver, as a party defendant to an action, has the same right to appeal from a judgment of the Court, affecting the interests of the estate represented by him, that the party or corporation to whom the estate originally belonged would have had if the suit had been brought against them."

In other words, these text writers hold this and only this: that the receiver can make for the party, whose property has been placed in his hands, the same defense that the party himself could make. This principle we do not question; but it being admitted in this case that the railway company could make no defense to appellee's claim—that the claim was just—it follows

of necessity that the receiver cannot resist its payment. The inability on the part of the receiver to comprehend the difference between *diminution of the estate* and *distribution of the assets of the estate* is well illustrated by reference to his petition for a rehearing (p. 47 Transcript of Record), where he says:

> "*It is immaterial whether a receiver represents only the mortgage trustee or all creditors, secured or unsecured, and that in either event it is his right and duty* for the preservation of the estate in his hands for whomsoever may be ultimately entitled thereto, to *resist the diminishing of that estate* by the payment to a general creditor in priority over all other creditors."

We would ask: How can the payment of a creditor, whose claim, conceded to be just, became preferred under the order of the Court, work a "diminishing" of the estate any more than would the payment of the bondholders? And we beg also to ask how the creation of a preference or priority as between creditors can work a diminishing of the estate? And what possible interest has the receiver in the creation of such preference or priority?

The receiver's suggestion that his right to appeal should have been raised on motion to dismiss, and hence could not be made in appellee's brief or argument when the cause was submitted in the Appellate Court, is answered by his admission that such a question can be raised by the Court of its own motion. If the Court will, of its own motion, dismiss, because of the want of appealable interest, the exercise of this power is certainly not abridged because the appellee suggests to the Court such want of appealable interest.

The receiver contends that there is an important distinction between a case of this kind, namely, a pro-

ceeding by a mortgagee to foreclose a mortgage, and a proceeding to wind up a corporation, in this, that in the latter case the Court takes possession of the property for the purpose of distributing it between all classes of creditors, while in the former case the Court takes possession of the property to apply it to the payment of the mortgage debt. In answer to this we suggest: It may be quite true that the purpose for which the Court takes possession of the property in the two classes of cases referred to may be as stated by the receiver, but the purpose for which the Court takes possession of the property can have no possible effect upon the duty of the officer of that Court in whose possession the property is placed. In each case it is the duty of such officer to make distribution in accordance with the order of the Court and not to determine for himself the manner in which distribution shall be made. If the presumption exists in this case that the mortgage debt is valid, there is not only a presumption that the intervener's claim is valid, but its claim is conceded to be valid, and hence the holder of the mortgage debt gains nothing by the presumption in his favor over the concession in favor of the intervener.

In *Mather Humane Transportation Co. v. Anderson, 76 F. R. 164*, cited by the receiver, the question of the appealable interest of the receiver was not raised or passed upon, so that the decision in that case can have no possible bearing upon this.

In *Hook v. Bosworth, 64 F. R. 443*, relied upon by the receiver as sustaining his right to appeal, the Court found that the record was in such condition that

> "it was unable to regard these receivers as representatives of others than the trustee of the mortgage, who is not entitled to the earnings prior to the receivership."

Does the receiver in this case take the position that he represents the trustee and the trustee only, or that in a contest between the trustee and any other party in interest he must represent the trustee as against such party in interest? If such is his position and he relies upon that position as sustaining his right to appeal in this case, then we insist that the mere statement of that position is in itself a sufficient answer to his claim that he has an appealable interest.

The case of *Bosworth v. National Bank, 64 F. R. 615*, is also relied upon by the receiver as sustaining his right to appeal. As to that case, we would say: In the first place, the receiver's right to appeal was not questioned; and, in the second place, the appeal in that case arose out of a contest between the receiver and the bank as to the validity of a lien asserted by the bank to exist in its favor upon certain funds. The insolvent railway company in that case was indebted to the National Bank in the sum of ten thousand dollars, upon which it had paid twenty-five hundred dollars, and for the balance had drawn drafts against a sum due it from another railroad company. The bank insisted that the drawing of these drafts was an appropriation by the insolvent railway company of the amount in the hands of the railway company upon which the drafts had been drawn, and that, therefore, it had a lien upon this fund; the receiver denied that any such lien existed in favor of the bank, and that the money paid to him by the drawing of the drafts did not come into his possession affected by any such lien. The court below sustained the contention of the bank, held that the bank did have a lien on the fund which had come into

the receiver's possession, and directed the receiver to pay the claim of the bank to the extent of this lien. Here was a manifest controversy between the receiver and the bank as to the existence and validity of the alleged lien of the bank upon a certain fund. It was unquestionably the duty of the receiver to contest the validity of this lien, but no such question arises in this case; nor is there any analogy whatever between the questions arising in the two cases. The same answer may be made to the case of *Bosworth v. Francis Hook*, cited by the receiver.

The case of *Thom v. Pittard, 8 U. S. App. 597*, cited by the receiver, sustained the right of receiver to appeal from a judgment rendered against him in an action by an employé to recover for personal injuries, but does not sustain the receiver's right to appeal in this case, because the principles involved in the two cases are wholly unlike. In this case the intervener's claim became preferred by virtue of the order of the appointment of the receiver; in the *Thom* case no such preference existed. In the one case there was a general order making all claims of a certain class preferred; in the other case, no such general order existed; in the *Thom* case the claimant sought to enforce a liability arising out of the negligent act of the receiver, and the Appellate Court held that the receiver had a right to ask the judgment of the Court of Appeals upon the question as to whether the act on his part complained of was negligent or not. No ingenuity can force any analogy between these cases.

The receiver contends that it was his duty to preserve the estate as against all "strangers to the original

controversy." Does he claim that it is his duty to "preserve the estate" against "past due taxes," which he conceded to be justly due; or to "preserve the estate" against the payment of "all current operating expenses;" or to "preserve the estate" against "all past due wages, as shown by the pay-rolls and on such proof as shall be satisfactory to the receiver or receivers?" Under the decree of the Court appointing the receiver in this case, past due taxes, current operating expenses, and past due wages and claims for materials and supplies incurred in the operation and maintenance of the property during the six months last past, and ticket, trackage and traffic balances, are all preferred over the mortgage debt; has the receiver a right to say that under this order he can ask the judgment of the court of last resort as to whether he should pay past due taxes admitted to be legally laid, current operating expenses and past due wages shown by the pay-rolls and shown on proof satisfactory to the receiver to be correct? Has he asked the judgment of the court of last resort in any one of these cases? Had he the right to require the engineer or switchman, who had rendered services within one week prior to his appointment, and whose claim for services so rendered is conceded to be just, to go with the receiver to the court of last resort in order to have the judgment of that court upon the propriety of the order of the court making the preference in the first instance? If he could not have attacked as improvident the order of the court giving to the wages of an employé, earned during the last week preceding the appointment of the receiver, a prior lien over the mortgage debt, how can he attack the same

order as improvident because it gives preference to a creditor of another class?

Felton v. Ackerman, 61 F. R. 225, does not present a single feature similar to the case now before this court. That case holds this, and only this, that, where the claim arises out of the management of the trust estate by the receiver, and the propriety of his action in this regard is questioned, or a claim is asserted against the trust estate based upon some act of the receiver, then the receiver has the right to appeal from an adverse decision of the court which appointed him; and in *Thom v. Pittard, supra*, it was held that, where the receiver contested the claim on the ground that it was invalid, he could appeal. There is no conflict between these cases and the decision of the court below in this case.

POINT II.

In appointing a receiver of the property of an insolvent railway company upon the application of the holders of its mortgage bonds, the court has the right, in the exercise of a reasonable discretion, to direct the payment of claims incurred in the operation of the property in preference to the mortgage debt; the payment of such claims may be made a condition of the appointment of the receiver.

The record is silent as to the evidence heard by the court when the bill of foreclosure in this cause was presented. It does, however, clearly appear from the record that so much of the order appointing the receiver as gave precedence to claims for materials and supplies, incurred within six months, over the mortgage debt, was objected to by the complainant in the

bill of foreclosure at the time the court entered the order, and that the objection was overruled by the court. In the absence of any evidence as to the matters before the court forming the basis for the exercise of its discretion in making this order, the presumption is that the court properly and fairly exercised this discretion. In the application for the appointment, the prayer is that a receiver may be appointed, "according to the course and practice of this court, with the usual powers of receivers in like cases." The application in this cause was made in September, 1893, and we think we may safely say that for more than twenty-five years prior to the making of this application it had been the "course and practice" of the court to which this application was presented, in granting applications of this character, to create uniformly a preference in favor of claims of the character now in question over the lien of the mortgage debt. The printed reports of the federal courts during that period will disclose the fact that time and again the complainant in this cause, the Mercantile Trust Company of New York, had made application to the federal courts for appointment of receivers, and in almost every instance in granting such applications the court had made an order similar to the one made in this cause; and hence the complainant in this cause well knew, before making the application, what the usual "course and practice" of the court was.

In *Turner v. Indianapolis, etc. R. R., 8 Bissell, 315*, cited at length by appellant, Judge Drummond, in referring to this question, says:

> "To refuse to pay anything whatever for past services, or supplies or materials, has never, it is believed, been attempted by any court or demanded by any mortgagee.

> The receiver goes into the possession of the railroad with all its appliances and instrumentalities, with its men at work on the track or running the trains, with its coal, oil, tools and other means of operating the road. The mortgagees have come into court asking it to assume possession of the road to protect their interests. Are the interests of all others, operatives and supply men, who happen to have claims against it at the time, to be absolutely ignored in the case of insolvent companies? I think not.
>
> "It is but fair to say, in the numerous cases which have come before the court, its rulings upon this subject have been generally acquiesced in by the counsel of the mortgagees."

It does not appear from the record in this cause that there was any peculiarity in the nature of appellee's claim which gives the reciver any special or specific ground of objection. Appellee's claim stands upon exactly the same footing as all other claims for supplies and material furnished within the six months preceding the receiver's appointment; in objecting, therefore, to the allowance of appellee's claim the receiver is forced to take the broad ground that, in appointing the receiver, the court could not give preference or priority over the mortgage debt to any claims for supplies or materials furnished at any time prior to the appointment of the receiver.

The *Turner* case was decided in 1878, so that we find that more than twenty years ago the courts recognized as well established the equitable principle, namely: that in appointing a receiver for the property of an insolvent railway company, it was the duty of the court to make provision for the payment of claims for materials and supplies furnished within a certain time prior to the appointment, and to give the payment of such claims preference over the mortgage debt.

From *Fosdick v. Schall, 99 U. S. 235*, we beg to quote as follows:

> "As to the second question, we have no doubt that, when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income, during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable."

Again:

> "Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do; for even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken, or something equivalent done, the whole earnings belong to the company and are subject to its control."

As suggested above, this court cannot know, for the record does not disclose, what facts were presented to the court when the application for the appointment of a receiver was made. As a condition, however, of making the appointment, the court had the right, in the exercise of a sound discretion, to say to the complainant in the bill for foreclosure, and so order, that

certain outstanding debts must be paid by the receiver in preference to the mortgage debt. In reply to the complainant's objection to this provision of the decree, the court appointing the receiver in this cause might well have referred complainant to the following language from *Fosdick v. Schall, supra:*

> "The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers, and to grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. And such an application always calls for the exercise of judicial discretion. And the chancellor should so mold his order that, while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied."

So far as we have been able to discover, however, in every case in which the question of the right of the court, when appointing a receiver, to create a preference in favor of claims of this character over the mortgage debt has arisen, such question has arisen only when the order was made subsequent to, and not a condition of, the appointment of the receiver. In no case, in which the order was made in the first instance, or as a condition of the appointment of the receiver, that we have been able to find, has the propriety of such an order been questioned. And we believe that the receiver will concede that not a single case is to be found in State or federal reports in which, when an order of this character was made at the time the receiver was appointed, the receiver has himself questioned the propriety of the order.

The record shows that counsel for the complainant objected to so much of the order as gave preference over the mortgage debt to claims for material and supplies; it does not appear that the objection was insisted upon; in fact, it does not appear that any exception whatever was filed to the order or any part thereof. For aught that appears to the contrary, the objection was simply oral, and by way of suggestion to the court, and was abandoned by the party making it. And hence we contend that, had the complainant in the foreclosure bill appealed from the finding of the trial court in this cause in appellee's favor, it could not now object to that finding upon the ground relied upon by the receiver.

It has been held time and again in the federal courts that the making of an order of this character, as a condition of the appointment of a receiver, is a matter within the judicial discretion of the court; in taking this appeal, therefore, the receiver attacks the judicial discretion of the court which appointed him, and assails as improvident the decree that gave him his official life.

The receiver insists that in no case can the court create a preference in favor of claims for supplies and materials over the lien of the mortgage debt unless there has been a diversion of income to the payment of interest on the bonded debt or to the betterment of the property. To this we answer: First, it does not lie within the mouth of the receiver to make this defense; Second, conceding the correctness of the receiver's contention, if he relies upon the improvidence of the order, it is incumbent upon him to show the facts upon which he bases his contention, and it is not incumbent upon

the appellee to show, in the first instance, that the court exercised a sound or reasonable discretion; and, Third—and repeating what we have before stated—the record being silent as to the matters before the court, the presumption is that the court exercised a sound discretion.

An examination of the authorities cited by appellant upon this branch of the case, as well as many others not referred to by him, will, we assert, establish clearly the position for which we now contend, namely, that in every case where application is made to a court of chancery by bondholders for the appointment of a receiver of an insolvent railroad company and for foreclosure of the mortgage, the court hearing the application and appointing the receiver has the right, in the first instance, and in the exercise of a reasonable discretion, and as a condition of appointing the receiver, to require that such receiver shall pay, out of funds that may come into his hands, or out of the proceeds of a sale of the mortgaged premises, claims for labor and supplies incurred in the operation and maintenance of the property within a certain period prior to the appointment of the receiver.

The question of the propriety of orders of this character is discussed at some length in the recent case of *Drennen et al. v. Mercantile Trust and Deposit Co.* (*Supreme Court of Alabama*), *A. and E. Corp. Cases* (*N. S.*), *Vol. 8, p. 60*, in which the court says:

> "To state the proposition yet more concretely, the equity arises and is rested upon one or another of the three following categories or states of facts: First, that the gross earnings of the corporation before the receivership, to which its operatives and laborers and persons furnishing necessary supplies are, upon all the authorities, entitled in

preference and priority to the bondholders, have been diverted from the payment of their wages and accounts, and paid to the bondholders, or are in the hands of the receiver to be paid to the bondholders, or to be expended by him in the further operation of the corporation's works for the benefit of the bondholders, or have been expended, either before or after the receiver is appointed, in the improvement and betterment of the mortgaged property, whereby the security of the bonds is increased, to the obvious advantage and benefit of the bondholders. Or, second, that whether, strictly speaking, there has been any diversion of gross earnings from the employes, directly or indirectly, to the bondholders, or not, the operatives and laborers have performed services and labor in the improvement and betterment of the mortgaged property, so that such labor and services have inured directly to the benefit of the bondholders, in the enhancement of the value of their security, and hence of their bonds; they thereby securing, in addition to the property embraced in their mortgages, the value of the services of the company's operatives and laborers, which value belongs to such operatives and laborers, and would have been paid to them, it is to be assumed, by the corporation, out of its gross earnings, but for the intervention of the bondholders, and the appointment, at their instance, of the receiver. Or, third, that labor and services have been performed and rendered in carrying on the business of the corporation and keeping it a 'going concern' (the mortgages and bonds evidencing a contemplation of the parties to them that the operations of the corporation should be kept on foot and going, and the necessity therefor, as a means of production of the net income out of which the bonds, principal and interest, are to be paid); that the business has been kept going by the receiver and earnings from it have been realized; that such earnings have been paid to the bondholders, or are held by the receiver; and that the laborers have not been paid for services thus rendered prior to the receivership."

In *Union Trust Company v. Souther, 107 U. S. 591*, the syllabus reads:

"Where the complainant prays for the appointment of a receiver of mortgaged railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound discretion, may, as a condition of granting the prayer, impose such terms touching the application of income arising during the

receivership to the payment of outstanding debts for labor, supplies, equipment or permanent improvement of the property, as under the circumstances of the case appear reasonable."

In the *Souther* case the complainant prayed that the "court will appoint a receiver according to the course and practice of this court with the usual powers of receivers in like cases;" in granting this application the court, of its own motion, directed the receiver to "pay and discharge all amounts due and owing by said railroad company for labor and supplies that may have accrued in the operation and maintenance of such railroad property within six months immediately preceding the rendition of this decree." In the case now before this court the complainant prayed "that a receiver may be appointed according to the course and practice of this court with the usual powers of receivers in like cases," and the order of the court was, in substance, similar to the order of the court in the *Souther* case. In the *Souther* case, claimant filed its intervening petition praying for the allowance of its claim; the claim was allowed and the receiver directed to pay it; the complainant and the receiver filed motions to set aside the order directing the payment of the claim. After the sale of the property the court set aside the order for the payment of the claim and allowed *the complainant alone to answer.* It thus clearly appears, in the *Souther* case, that the court clearly recognized that the receiver was not in a position to object; the complainant, after the order directing the payment of the claim had been set aside, filed its answer and the court heard evidence thereon, but again entered a decree allowing the claim and directing its payment.

In passing upon the appeal of the complainant from this last order, Chief Justice Waite, after citing the rule in *Fosdick v. Schall*, says:

> "To this we adhere, and, in our opinion, the right to impose terms does not depend alone on whether current earnings have been used to pay the mortgage debt, principal or interest, instead of current expenses; many other circumstances may make such an order reasonable, and this case furnishes a striking example."

The case of *Wood v. Guarantee Trust and Safe Deposit Co., 124 U. S. 416*, does not in any degree contravene the position for which we contend, or the rule as laid down in *Fosdick v. Schall*. In fact, the case of *Fosdick v. Schall* is cited in the *Wood* case.

In *Burnham v. Bowen, 111 U. S. 776*, the court quotes with approval from *Fosdick v. Schall*, as follows:

> " 'Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income.' "

And then adds:

> "Such being the case, when a court of chancery, in enforcing the rights of mortgage creditors, takes possession of the mortgaged railroad and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession, that is to say, pay out of what it receives from earnings all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings."

It is not contended or even suggested by the receiver that appellee's claim was not in the nature of a current debt, and one which, consequently, should have been paid out of current earnings. In fact, it is conceded that the claim was for labor performed and materials

furnished to the defendant railway company in the operation and maintenance of its property, and hence was one which, in all "equity and good conscience," should have been paid out of the current earnings.

Touching a claim of this character the court, in *Burnham v. Bowen, supra*, says:

> "In the present case, as we have seen, the debt of Bowen was for current expenses and payable out of current earnings. It does not appear from anything in the case that there was any other liability on account of current expenses unprovided for when the receiver took possession, and there was nothing whatever to indicate that this debt would not have been paid at maturity, from the earnings, if the court had not interfered at the instance of the trustee for the protection of the mortgage creditors."

The following language from the same case is strikingly applicable to the case now before this court:

> "It is said, however, that as no part of the income before the appointment of the receiver was used to pay mortgage interest, or to put permanent improvements on the property, or to increase the equipment, there was no such diversion of the funds belonging in equity to the labor and supply creditors as to make it proper to use the income of the receivership to pay them."

To this the Court answered:

> "The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bond creditors. . . . So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances, we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the court after the receiver was appointed as that before. . . . So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound, in equity and good conscience, to use it if no change in the possession had been made."

It is well to note that in the *Burnham* case no order was made in the first instance for the payment of debts owing for current expenses. The receiver was appointed in 1875, and the claim which the court ordered preferred and paid was for coal furnished in 1874. Yet, notwithstanding the fact that the court appointing the receiver had not directed the payment of this or like claims in the first instance, it subsequently made an order providing for the paymeat of this claim, and in approving this order this court said:

> "The business of every railroad company is necessarily done more or less on credit, all parties understanding that current expenses are to be paid out of current earnings. Consequently, it almost always happens that the current income is encumbered to a greater or less extent with current debts made in the prosecution of the business out of which the income is derived."

Nothing can be found in the case of *Farmers' Loan & Trust Co. v. Green Bay Railway Co., 45 F. R. 664*, which is not in harmony with the rule in *Fosdick v. Schall*, so frequently cited with approval; in *Farmers' Loan & Trust Co.* case Judge Jenkins says:

> "The Supreme Court, as I read the opinions has been most careful to limit the doctrine to claims representing that which has inured to the benefit of the mortgaged property, such as labor and supply claims, allowing priority to such claims, because their non-payment would cause cessation of work, supplies and running arrangements, and result in the stoppage of the operation of the road, which, in the interest as well of the bondholders, as well as of the public, is not to be tolerated."

The claim in *Farmers' Loan & Trust Co.* case was for damages resulting from death, and the court held that this was not a claim which could be said in any way to have benefited the mortgaged property.

In *American Loan & Trust Co. v. Railway Company, 46 F. R. 101*, the question arose as to the right of priority in favor of a claim for the original construction of a portion of the road accruing more than six months before the appointment of the receiver. The court held that this was not such a claim as came within the rule authorizing the court to provide for arrears due for operating expenses, in the absence of a showing that there had been a diversion of current funds or income which should have been applied to the payment of the claim. There is nothing in this holding that conflicts with the finding of the trial court in this case. In the *American Loan & Trust Co.* case, the claimant did not seek to come within the provisions of the order appointing the receiver; on the contrary, it clearly appears that his claim was not of the class for the payment of which the court made provision in the first instance, and it was sought to find an equitable basis upon which the claim might rest, and the court held that, in order to furnish this equitable basis, the claimant must show that funds which should have been applied to the payment of his claim had been applied to the payment of interest on the bonded debt. In the case now before this court, the court below, in appointing the receiver, did make provision for the payment of appellee's claim, and the claim was for labor and supplies incurred in the operation of the road within six months preceding the appointment of the receiver.

In *Kneeland v. American Loan & Trust Co., 136 U. S. 89*, Judge Brewer, in delivering the opinion of the court, clearly recognizes, affirms and approves the rule to the effect that, in appointing a receiver, the

court has the unquestioned right to make, as a condition of such appointment, the payment of unsecured claims which have, by uniform rulings of the court, been given an equitable priority. A portion of the syllabus in that case reads as follows:

> "The appointment of the receiver of a railroad vests in the court no absolute control of the property and no general authority to displace vested contract liens, and when a court makes such an appointment it has no right to make the receivership conditional on the payment of any unsecured claims, *except the few which, by the rulings of this court, have been declared to have an equitable priority.*"

The italics in the above citation are ours.

Appellant has failed to cite a single case in which the equitable priority of claims of the character involved in this controversy has not been recognized and enforced. It is interesting to note that the opinion in the *Kneeland* case was delivered in May, 1890; in May of the preceding year, the judge delivering that opinion had, at the instance of the bondholders, appointed a receiver of the property of the St. Louis, Arkansas & Texas Railroad Company, and in making the appointment had directed the receiver to pay,

> "all just claims and accounts for labor and supplies incurred within six months prior to the appointment."

Central Trust Co. v. St. Louis, Arkansas & Texas R. R. Co., 41 F. R. 551. In rendering the opinion in that case, Judge Caldwell quotes from a letter from the judge who rendered the opinion in the *Kneeland* case, as follows:

> "I did not understand from the parties making the application for receiver that there was any desire or thought of cutting off any just claims accruing during the brief

> period which has elapsed since their mortgage was given, and, if counsel or party had any such idea, they much mistake my judgment in the premises."

Judge Caldwell then adds:

> "The better practice is for the judge or court appointing the receiver to stipulate at the time and, as a condition of the appointment of the receiver, what debts and liabilities of the railway company shall be made a charge on the property and paid by the receiver. If the mortgagee is unwilling to take a receiver on the terms imposed, the foreclosure can proceed without a receivership."

In the case before this court, on the very day on which the application was made, and at the time the application was made, the judge said to the applicant that in granting the application and in making the order for the appointment of the receiver, he would direct the payment of demands of the class within which appellee's claim falls; and while the applicant, at the time, objected to this provision of the order, it nevertheless took the receiver, has reaped all the benefits that arose therefrom, and from that day to this, so far as the record discloses, neither the applicant nor any interested party has questioned the propriety of the order.

In *Blair v. St. Louis, etc. Ry. Co., 22 F. R. 421*, it is said:

> "In the order appointing a receiver no provision for the payment of claims was made, and it is conceded that there is nothing to show that since the default in the payment of interest there has been any diversion of income to permanent improvements. Now the broad proposition is laid down by counsel, that, unless a diversion, as stated, is shown, or unless the court, as a condition of appointing a receiver, requires the payment of certain claims, none can be preferred to the mortgage debt. . . . I think the Supreme Court has decided against this claim."

In the *Blair* case it was not contended that the court did not, in the first instance, have the right to make the order; but the contention was that the order, not having been made in the first instance, a receiver having been appointed without the imposition of such a condition, no priority could be created by a subsequent order unless the party seeking such subsequent order could show a diversion; and yet this claim, by no means so broad as the contention of the appellant in this case, the court held could not be sustained.

The equitable rule which provides for the payment of pre-existing debts does not rest upon the ground of diversion alone.

In the case of *Miltenberger v. Logansport Railway Company, 106 U. S. 286* (*l. c. 311*), it is said:

> "Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, *under the order of the court*, with the priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged prop-

> erty in a large sense, by maintaining the good-will and integrity of the enterprise, and entitle them to be made a first lien."

The principle above declared is approved in *Union Trust Co. v. Illinois & Midland Railway Co., 117 U. S. 434.*

In *Wood v. Guarantee Trust and Safe Deposit Co., 128 U. S. 416*, intervener sought to have preferred a claim for a debt contracted by the insolvent in the construction of the water-works at Joliet. In commenting on the argument advanced by the intervener in support of its claim, this court says:

> "First, it (the argument for intervener) overlooks the vital distinction between a debt for construction and one for operating expenses. The doctrine of *Fosdick v. Schall* is applicable wholly to the latter class of liabilities. . . . Secondly, it overlooks the important fact that the doctrine only applies where there is a diversion of the income of a 'going concern' from the purpose to which that income is equitably primarily devoted: viz., the payment of the operating expenses of the concern."

From *Farmers' Loan and Trust Co. v. Kansas City, etc. Railway Co., 53 F. R. 182*, we beg to quote as follows:

> "The court appointing a receiver may impose such conditions as appear to be just and equitable, and the party asking for and accepting the appointment of a receiver on the conditions imposed will be bound thereby."
>
> "And it is an error to suppose that such debts can only be given priority where there has been a diversion of the income of the road; nor is it true that they can only be paid out of earnings of the road and cannot be made a charge on the *corpus* of the property. Diversion of the income is not essential to give them priority, and they may be made a charge upon the *corpus* of the estate if the earnings are not sufficient to pay them.
>
> "It is due to the trustee to say that it has not at any time shown the slightest disposition to break its faith with the creditors or the court in this matter, but, on the

> contrary, has at all times exhibited that high sense of business integrity and honor which should always characterize those engaged in the management and execution of large financial trusts.
>
> "In compliance with the order of the court, the creditors have presented their claims and they have been allowed. . . . The creditors and the public had a right to rely upon the court's order. Courts should keep faith with suitors and the public, if no one else does."

Touching the duty of a receiver, in *Union Trust Co. v. Illinois & Midland Ry. Co., 117 U. S. 434*, it is said:

> "The view taken by the commissioners and confirmed by the Circuit Court was, that the receiver, as an executive officer of the court, was entrusted with all the properties committed to his charge, to use and preserve them, under the directions of the court, for the benefit of all parties in interest."

This definition of the position of the receiver as declared by the commissioners and the Circuit Court is approved by this court.

In the very recent case of *Ames v. Union Pacific R. R. Co., 74 F. R. 335*, the court says:

> "The proposition is now too well settled to permit of argument, that there are certain claims against a mortgaged railroad company accruing before the appointment of a receiver in foreclosure, which are entitled to a preference over a prior mortgage debt, in payment out of the earnings of the railroad during the receivership and out of the proceeds of a sale of its property."

In concluding this branch of the case, we respectfully submit that not a single expression can be found in any case decided by a federal court which militates against our position, namely, that, where the Court of Chancery, appointing a receiver upon the application of the bondholders in a foreclosure proceeding, makes, in the first instance, and as a condition of that ap-

pointment, the payment by the receiver of claims for materials and supplies incurred within six months prior to the appointment of the receiver, the making of such an order is clearly within the sound discretion of the court, and has been uniformly sanctioned and approved by all federal courts.

POINT III.

When the record is silent as to the facts on which the court entered the order preferring claims of a certain class, the Appellate Court will not say such order was improvidently entered.

As the decree directing the payment of intervener's (appellee's) claim was made in pursuance of, and in conformity with, a provision of the order appointing the receiver giving preference over the mortgage debt to claims of a certain character, the finding in this case cannot be assailed unless the general order in pursuance of which it was made can be attacked as improvident. If the general order stands, the finding in this case must stand. We insist the general order must stand because (1), in accordance with the uniform practice of all federal courts for a period of more than twenty-five years, repeatedly sanctioned and approved by this court, (2) founded on equity and good conscience, (3) made as a condition of the appointment of the receiver and acquiesced in by the acceptance of the receiver upon that condition, and (4) not subsequently objected to by any party in interest.

The record does not disclose any part of the evidence upon which the court acted in making the general order in the first instance; and—

> "the rule in equity, as at law, is: that in the absence of all testimony upon which the lower court acted, it will be presumed that everything was established which could have been proved under the pleadings by any reasonable intendment."
>
> *Smith v. Fletcher, 11 S. W. Rep. 824.*

It is not necessary to contend or insist that the judge appointing the receiver in cases of this character has the absolute right to make, as a condition of such an appointment, a decree giving to outstanding debts for labor and supplies incurred in the operation of the property, and which should have been paid out of the current income, priority over the mortgage debt; yet it cannot be denied that the judge has, in such cases, in the exercise of a sound judicial discretion, this power. Hence, in attacking the order in this cause the receiver questions "the sound judicial discretion of the court," and the burden lies upon him (if he is permitted to be heard at all) to show that proper, sound discretion was not exercised. We think it not amiss to suggest, in passing, that the attempt of the receiver, made in this case, to question the discretion of the court in making an order for the disposition of the funds of the receivership, is novel and unique. The term "judicial discretion" or "sound discretion," as used in the opinions of the court, we take it, means simply the right of the judge to decide, upon the evidence submitted, as his best judgment may dictate. The receiver cannot substitute his discretion for that of the trial court, nor will the Appellate Court interfere with the action of the trial court exercised in accordance with the sound discretion of the court in cases where the law gives to that court the right to exercise its discretion. In this case the

court was asked to make the appointment in accordance with its usual course and practice. The usual course and practice of the court had been, for many years, to make just such an order as was made in this cause, and this course and practice had been uniformly sustained by all Appellate Courts into which it had come for review. Hence, the failure of the court to make such an order would have been a departure from its usual course and practice, and would not have been in accordance with the prayer of the foreclosure bill.

It is not incumbent upon the appellee to satisfy this court that, in making the order in this case, the court below exercised a "sound discretion," or to present to the court the facts upon which that discretion was exercised. It is the receiver who is attacking as improvident the order of the court; and it is, therefore, incumbent upon him to show an abuse of the discretionary power of the judge exercised in making the order.

> "In so far as they [trial courts] are vested with discretionary powers, they are presumed to have been properly exercised until the contrary is shown. . . . The rulings of the Circuit Court will be presumed to have been in accordance with the justice and merits of the case, unless the complaining party shows unequivocally that the court has been guilty of an abuse of its discretionary power."
>
> *Detro v. State, 4 Ind. 200.*

Is there anything in the record before this court to show an abuse of discretionary power by the court below in making the order or decree complained of? Is the burden upon appellee to show that there was no abuse of discretionary power? Will this court presume that the court below abused its judicial discretion?

> "If the appellate tribune is compelled to resort to presumptions, it would choose that which sustains the proceed-

> ings of the trial court, and reject that which overthrows it. If the condition of the record is such as to require the higher court to act upon presumptions, it will, without hesitation, adopt the presumption that upholds the judgment from which the appeal is prosecuted."
>
> *Elliott's Appellate Procedure, Sec. 709.*

Again:

> "The rule that all reasonable presumptions and intendments will be made in favor of the rulings of the trial court, is one of the best settled and most frequently applied rules in appellate procedure."
>
> *Ibid., Sec. 710.*

We do not say that in no case will the propriety of an order of this kind made by the court below be subject to review by an Appellate Court. What we insist is: First, that a receiver cannot question the propriety of such an order; and, second, that it is incumbent upon any party in a position, to raise the question, and alleging the abuse of judicial discretion, or complaining of the propriety of such an order, to make it clear from the record that there was such abuse of discretion, or that there was such improvidence in the order. We insist that there is nothing in the record giving any semblance of such a showing. For all that appears to the contrary, the order was entered after hearing of all matters relating to the controversy and full consideration. The record shows that it was entered after hearing argument in opposition, and hence every possible presumption must exist in favor of the order.

It is quite true that, as claimed by appellant, the record now before this court fails to show that appellee, in submitting its claim before the Master in Chancery, offered any proof of diversion by the insolvent railway

company of its income to the payment of interest on its bonded debt prior to the appointment of the receiver. Under the general order of reference, in pursuance of which this claim was referred to the master, and upon the pleadings, no such proof could have been offered before the master, either in support or denial of the claim of diversion. It was not for the master to determine whether or not there had been a diversion. This question was not one which he could pass upon under the general order of reference, nor could it possibly arise upon appellee's intervening petition. Was it for the Master in Chancery to say or find that the court's order was improvident? Did the court delegate to the Master in Chancery by it appointed, the power to determine whether the court had abused its judicial discretion? The one question, and the only question, upon which the master had to pass was, whether appellee's claim was just and embraced within the class preferred by the order of the court. Upon this question the Master in Chancery found in appellee's favor, and the receiver concedes the finding to be correct, and so, when exceptions were filed to the master's report, in passing upon those exceptions the court dealt only with the questions submitted to the Master in Chancery.

In his brief below the receiver good-naturedly criticises the form of the intervening petition, and we beg to acknowledge our indebtedness to him for a very clear and concise exposition of the office of pleading. We readily confess that the intervening petition is informal, but it states, beyond question, every fact necessary to bring appellee's claim within the order of the court making that claim preferred; this was all that appellee desired to present to the court; if there existed

any special defense to the claim which the receiver desired to make, it was certainly his duty to make this defense known; his answer simply requires the claimant to make strict proof of its demand.

Had the question of diversion been submitted to the Master in Chancery, and had he found that there had been no diversion and consequently, in his opinion, appellee's claim should not be allowed, his finding would in effect have been a reversal or modification of the decree of the court—which the Master in Chancery might well have hesitated to make. The receiver apparently feels no such hesitation.

The transcript of record filed in this court is not a complete transcript of all of the proceedings in the foreclosure case; the transcript filed gives only such portions of the record as in the receiver's judgment relate to or bear upon appellee's intervening petition; but the partial transcript does show that before entering the decree from which this appeal is taken the trial court was "sufficiently advised." From the record now before this court, can it be said that the trial court was not sufficiently advised? Is it for appellee to show that the trial court was sufficiently advised?

If the receiver's contention is correct, that appellee's claim should not have been allowed without a specific allegation by the appellee in its petition, and proof before the master, of diversion by the insolvent railway company prior to the appointment of a receiver, then not a single one of the claims of the four classes preferred in the order of the court could have been properly paid by the receiver without a specific allegation and proof in each case of diversion. He had no right to pay an engineer the amount of wages due him for

services rendered during the week preceding the appointment of the receiver until a bill in equity had been filed by the engineer setting forth all the facts in the case and charging diversion. If this is true, the order made in the first instance goes for naught.

The case of the *St. Louis, Alton & Terre Haute Railroad Co. v. C., C., C. & I. R. R. Co., 125 U. S. 658*, so confidently relied upon by the receiver, has no analogy to the case at bar. In that case the claimant did not seek to avail itself of the provisions of the original order. It sought an enlargement of the order; it sought to have allowed and preferred a claim for the payment of which no provision was made in the first instance and which did not fall within the class of claims which had been preferred under previous orders in like cases. Under these circumstances, of course, it was incumbent upon the claimant to show some special equity existing in his favor, and which would justify the court in ordering the payment of its claim.

POINT IV.

An objection to the allowance of a claim, in a receivership proceeding, not made before the Master in Chancery to whom the claim was referred, or in the trial court upon exceptions to the report of the master allowing the claim, cannot be made in the Appellate Court.

Although we should concede to the receiver the possession of that most remarkable and extraordinary power which he now seeks to exercise, namely, the right to attack as improvident the original order of the court creating the preference in favor of claims for materials and supplies over the lien of the mortgage debt,

when we find that the sole basis of his ground of objection is that the record furnishes no evidence of diversion, we beg to suggest that it would have been only fair to the court below and to the intervener that in some way notice should have been given of this objection.

It appears from the record that the receiver accepted his appointment on the day on which the order was entered and without protest against, objection or exception to, the general instruction given him touching payment of claims of this character; that this order was entered in September, 1893, and stood unmodified on May 27, 1895, when appellee's intervening petition was filed, stands to-day, and no appeal was ever taken from the order.

In his exceptions to the master's report, there is no intimation that the receiver intends to make or rely upon this objection, nor in such exceptions is there any suggestion that, in his opinion, the court had failed to exercise proper or sound judicial discretion. In his assignment of errors, we find naught that smacks of such a suggestion, nor in his answer to the intervening petition do we find any trace of a conflict of opinion between himself and the trial court as to the propriety of the order of the court, and yet the alleged improvidence of this order is the ground, and the sole ground, of his appeal.

As before stated, the record is silent as to the evidence heard by the court when the order was entered, and hence does not disclose what proof, if any, touching diversion was submitted to the trial judge. The receiver cannot claim, and especially for the first time in the Appellate Court, that the absence of such proof

renders nugatory the general order of the trial court creating a preference of claims of this character over the lien of the mortgage debt.

We respectfully ask an affirmance of the judgment.

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